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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

— VS. —

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF THE NATIONAL EMPLOYMENT LAW PROJECT, INC., AS *AMICUS CURIAE*

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INDEX

PAGE

Interest of the National Employment Law Project, Inc. 1

Consent of the Parties 2

Introduction and Summary of the Argument 2

Argument 4

I. Factual Analysis 4

A. The use of grade point averages and Medical College Admission Test scores as entry criteria, without a special admissions program, has excluded and will exclude almost all minority candidates 4

1. Grade Point Averages 6

2. The Medical College Admission Test 8

B. The admission criteria which impact adversely on minority applicants do not bear any proven relationship to physician or medical student performance 10

1. Grade Point Average as a non-predictor of physician and medical student performance 10

2. The MCAT as a non-predictor of physician and medical student performance 13

PAGE

C. The Medical School had prior knowledge of the disparate impact of the selection criteria and their invalidity 16

D. The record below 17

II. Legal Analysis 18

A. Abandonment of the special admissions program as ordered by the court below will result in unlawful discrimination 18

1. The equal protection clause 18

2. Title VI of the Civil Rights Act of 1964 21

B. The special admission program did not create racial categories; it made rational adjustments in selection procedures to equalize admission opportunities as among the "qualified" applicants 24

C. Assuming arguendo the creation of racial classifications, the special admissions program was a constitutionally valid exercise of the state's power to remedy and avoid unlawful discrimination 26

1. Racial classifications can be used to remedy past and present unlawful discrimination 26

2. A judicial finding of discrimination was not a prerequisite to the adoption of the special admissions program 31

PAGE

3. There are no alternative methods preferable to the special admissions program 33

D. The compelling state interest test is inapplicable here, but even if it is, such an interest is present 36

CONCLUSION 39

APPENDICES:

APPENDIX A 41

APPENDIX B 42

APPENDIX C 43

TABLE OF AUTHORITIES CITED

Cases:

Alevy v. *Downstate Medical Center*, 39 N.Y.2d 326 (Ct. App. N.Y. 1976) 31

Associated General Contractors of Massachusetts, Inc. v. *Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) 25, 32

Bakke v. *The Regents of the University of California*, 18 Cal.3d 34 (Sup. Ct. Cal. 1976) ..... *passim*

Beer v. *United States*, 425 U.S. 130 (1976) 24

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 28

Brown v. *Board of Education*, 347 U.S. 483 (1954) 17, 38

Califano v. *Webster*, —— U.S. ——, 97 S. Ct. 1192 (1977) 30

PAGE

Carter v. *Gallagher*, 452 F.2d 315 (8th Cir.) (*en banc*), *cert. denied*, 406 U.S. 950 (1972) 31
Castaneda v. *Partida*, —— U.S. ——, 97 S.Ct. 1272 (1977) 20, 35

EEOC v. *American Telephone & Telegraph Company*, 419 F.Supp. 1022 (E.D. Pa. 1976), *aff'd*, —— F.2d ——, 45 U.S.L.W. 2508 (3rd Cir., April 22, 1977) 32, 33
Emeryville Citizens for Better Government v. *Neary*, C-71-940 CBR (N.D. Cal., Oct. 26, 1973) 33

Franks v. *Bowman Transportation Company*, 424 U.S. 747 (1976) 28, 29

Germann v. *Kipp*, —— F.Supp. ——, 45 U.S.L.W. 2486 (W.D. Mo., April 7, 1977) 32, 33
Graham v. *Richardson*, 403 U.S. 365 (1971) 36, 37
Griggs v. *Duke Power Company*, 401 U.S. 424 (1971) 22, 29

Harper v. *Virginia State Board of Elections*, 383 U.S. 663 (1966) 28, 37

International Brotherhood of Teamsters v. *United States*, —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977) 29

Lau v. *Nichols*, 414 U.S. 563 (1974) 22, 24, 29

McLaurin v. *Oklahoma State Regents*, 339 U.S. 637 (1950) 37
Martinez v. *Grand Rapids Civil Service Board*, No. G-178-72, 6 Cir. Hs. Rev. 685 (W.D. Mich., Jan. 22. 1973) 34

PAGE

Mims v. *Wilson*, 514 F.2d 106 (5th Cir. 1975) 31
Morton v. *Mancari*, 417 U.S. 535 (1974) 25, 29

NAACP v. *Imperial County Irrigation District*, No. 60-302-GT (S.D. Cal. 1972) 33

Penn v. *Stumpf*, C-6JCL (N.D. Cal., Dec. 20, 1973) 33
Pennsylvania v. *O'Neill*, 348 F.Supp. 1084 (E.D. Pa. 1972), *modified en banc*, 473 F.2d 1029 (3rd Cir. 1973) 31
Perry v. *Sindermann*, 408 U.S. 593 (1972) 28

Reynolds v. *Sims*, 377 U.S. 533 (1964) 28
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 36

San Antonio Independent School District v. *Rodriquez*, 411 U.S. 1 (1973) 36
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 31, 32
Sweatt v. *Painter*, 339 U.S. 629 (1950) 2, 37

United Jewish Organizations v. *Carey*, —— U.S. ——, 97 S.Ct. 996 (1977) ..... *passim*
United States v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977) 30, 35
United States v. *City of St. Louis*, 410 F.Supp. 948, *modified* 418 F.Supp. 383 (E.D. No. 1976) 33

United States v. *Operating Engineers, Local 3*, C-71-1277 RFP (N.D. Cal. 1973) 34

Village of Arlington Heights v. *Metropolitan Housing Development*, —— U.S. ——, 97 S.Ct. 555 (1977) 20

PAGE

Washington v. *Davis*, 426 U.S. 229 (1976) 19, 35
Woods v. *City of Saginaw*, 75 10083JH (E.D. Mich. 1977) 33

STATISTICAL DATA

The Social and Economic Status of Negroes in the United States, 1970 BLS Report No. 394 (published in 1971 by the Bureau of the Census), p. 81, Table 67 8

PSYCHOLOGICAL TESTING HANDBOOKS

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Sedlacek, W.E., Ed., *Medical College Admission Test Handbook for Admissions Committees*, Second Edition (American Association of Medical Colleges, Evanston, Ill. 1967) 14

STATUTES AND REGULATIONS

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d 18, 21, 29

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e 1, 29

Social Security Act, Section 215(b)(3), 42 U.S.C. §415(b)(3) 30

Voting Rights Act of 1965, 42 U.S.C. §1971 24

45 C.F.R. §80.3(b)(2) 21

45 C.F.R. §80(b)(6) 22

45 C.F.R. §80.5(i) and (j) 23

REPORTS AND ARTICLES

PAGE

Colorado Advisory Committee to the United States Commission on Civil Rights, *Access to the Medical Profession in Colorado by Minorities and Women* (Denver, June, 1976) 15

Ely, "The Constitutionality of Reverse Discrimination," 41 *U. Chi. L. Rev.* 723 (1974) 36

Health Policy Advisory Center, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (New York, 1977) 3

Hoyt, *The Relationship Between College Grades and Adult Achievement* (Iowa City, Iowa's American College Testing Program, 1965) 12

Johnson, D.G. and Hutchins, E.B., "Doctor or Dropout? A study of Medical School Attrition," 41 *J. Med. Educ.*, No. 12, p. 1107 (December, 1966) 13

"New York Medical Schools Lag In Attracting Minority Students," *The New York Times*, April 28, 1977, p. A1, col. 4 3

Price, Philip B., *et al.*, *Measurement and Predictors of Physician Performance* (LLR Press, South Salt Lake City, Utah, 1971) 10, 11, 12, 13, 35

Zeim, Grace, "Social and Educational Determinants of the Race, Sex and Social Class Origins of U.S. Physicians" (unpublished Thesis and Study) (Harvard School of Public Health, 1977) 6, 7, 8, 14

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BRIEF OF THE NATIONAL EMPLOYMENT LAW PROJECT, INC., AS *AMICUS CURIAE*

Interest of the National Employment Law Project, Inc.

The National Employment Law Project, Inc. ("The Project") is a legal services organization which provides back-up assistance to local legal services offices in all areas of employment law. In conjunction with these local offices, and in some instances on its own, the Project represents a number of individual clients in employment discrimination litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as well as constitutional and other statutory provisions.

Since its inception in 1969, the Project has been involved in efforts to combat the effects of racial discrimination in employment. It believes that progress in civil rights depends primarily upon the voluntary efforts of public and private organizations to rectify the widespread effects of racial discrimination. Racial discrimination, even if unintended, is so pervasive that the full course of the litigation process alone cannot be relied upon to protect the rights of racial and ethnic minorities. *Amicus* has been involved in the creation of numerous affirmative action programs, voluntarily and involuntarily adopted by private employers and public agencies, that use racial classifications to remedy racial discrimination. Affirmance in this case would seriously jeopardize, if not destroy, these and future programs, to the severe detriment of the Project's minority clients.

Consent of the Parties

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, and filed herewith, *Amicus* respectfully submits this brief in support of the Regents of the University of California, Petitioner.

Introduction and Summary of the Argument

Special admissions programs aimed at increasing minority representation at all levels of undergraduate and graduate education are a relatively recent phenomenon. The problem they seek to alleviate is not. This Court may judically note that until recently, the nation's graduate professional schools were the almost exclusive bastion of the white majority. Cf. *Sweatt* v. *Painter*, 339 U.S. 629 (1950). Indeed even though minority admissions programs

have been in effect over the past few years, the nation's medical schools today "account for a smaller percentage of minority students than they did in 1969." [1]

In the instant case, respondent challenges the special admissions program at the Medical School of the University of California at Davis ("The Medical School"). This program was created to ensure minority applicants equal opportunity for entrance into the Medical School; and the desired effect was to increase minority enrollment at the School.

Respondent, who is white and applied to the Medical School in 1973 and 1974, challenges the special admissions program on the grounds that his constitutional right to equal protection of the laws has been violated. He contends that but for the program, he would have been admitted,[2] and since the program took race into account in evaluating applicants, he was denied his Fourteenth Amendment right to equal protection of the laws. The California Supreme Court accepted respondent's Constitutional argument.

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[1] "New York Medical Schools Lag in Attracting Minority Students," *The New York Times*, April 28, 1977, p. A1, col. 4. The article points out that the New York experience of decline "follows national trends." *Id.* See Health Policy Advisory Center, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (New York, 1977).

[2] *Amicus* is aware that the record below is insufficient to show that respondent could have been admitted, even absent the program, and in fact indicates that in all probability he would not have been admitted. As a result, serious questions exist as to respondent's standing and to this Court's jurisdiction to hear the case. In addition, petitioner's stipulation that it could not prove that respondent would not have been admitted raises some doubts about the zeal with which this case was defended below. These issues were adequately raised in the *Brief of the National Urban League, et al. as amici curiae*, filed in opposition to the *Petition for Certiorari*. *Amicus* here does not express opposition to the position taken in that brief.

Bakke v. *The Regents of the University of California*, 18 Cal. 3d 34 (Sup. Ct. Cal. 1976).

It is clear that race was taken into account in selecting from the many applicants to the Medical School. *Amicus* contends that the use of race as a factor in the selection process was permissible and further, that it was constitutionally and statutorily required. It will be shown that the traditional criteria used by the Medical School discriminate against minority applicants and bear no relation to medical school or physician performance. From these facts a number of independently compelling reasons arise for reversing the decision below. First, if the special admissions program were not used, the Medical School would violate the United States Constitution and applicable federal statutes. Second, the program did not create racial classifications, but sought (by taking race into account) to avoid them, and thus respondent's equal protection claim is without substance. Third, the program was a valid exercise of the state's power to avoid and eliminate racial discrimination. And fourth, even if a compelling state interest is required for the program, such an interest is present.

ARGUMENT

I. Factual Analysis.

A. *The use of grade point averages and Medical College Admission Test scores as entry criteria, without a special admissions program, has excluded and will exclude almost all minority candidates.*

At the center of this case is the fact that the Medical School has used selection criteria which impact severely and detrimentally on minority applicants and which have not been shown to relate to applicants' performance as physicians or as medical students.

The record indicates that the Medical School opened in 1968. Since 1969,[3] it has used a two-tiered system for selecting from candidates for admission. Applicants who requested consideration as disadvantaged members of a minority group[4] were evaluated and rated by a special admissions committee (also known as the "Task Force" Committee), and recommended to the regular admissions committee until a designated goal was reached.[5] All other applicants were handled by the Medical School's regular admissions committee.

The criteria used by both committees to evaluate and rate applicants were the same: (1) Grade Point Averages ("GPAs"); (2) the Medical College Admission Test ("MCAT") (referred to collectively herein as "traditional" criteria); and (3) results of interviews of the candidates.

The record indicates that GPA and MCAT performance were highly determinative, if not dispositive, of non-minority applicants' admissions to the Medical School. Absent the special program, admission of minority applicants similarly would have hinged upon their success in satisfying

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[3] *I.e.*, in selecting from applicants for the class entering in 1970. The record does not indicate the procedure used for the first two classes that entered the Medical School. However, a special admission program was not used. *Bakke* v. *The Regents of the University of California, supra*, 18 Cal. 3d at 53-54; *Petition for a Writ of Certiorari*, p. 5.

[4] From year to year the definition of those covered by the special admissions program changed. *See Bakke* v. *Regents of the University of California, supra*, 18 Cal. 3d at 40-41. However, it is not disputed that the special admissions program was used solely to admit applicants from minority groups. *Id.* at 41, 44.

[5] *Deposition of George Lowrey, M.D.*, p. 25 (Clerk's Transcript p. 166).

these criteria. In fact, prior to institution of the special admissions program, only three minority group members qualified for admission under the traditional criteria. *Bakke* v. *The Regents of the University of California, supra,* 18 Cal. 3d at 53-54; *Petition for a Writ of Certiorari,* p. 5. Throughout the tenure of the special admissions program, candidates admitted thereunder would not have entered the Medical School had they been rated and ranked by traditional criteria against the regularly admitted white candidates. *Petition for a Writ of Certiorari,* p. 6.

Since the traditional criteria used by the Medical School, absent the special admissions program, would be virtually determinative of one's chances of being admitted, each of the criteria is discussed separately below.

1. Grade Point Averages

A recent study and thesis by Dr. Grace Zeim, M.D., Ph.D., completed in 1977, investigated the "Social and Educational Determinants of the Race, Sex and Social Class Origins of U.S. Physicians."[6] In researching her thesis Dr. Zeim used data provided by the Association of American Medical Colleges ("AAMC") for all applicants to member medical schools.[7] With respect to the relative

[6] This thesis has not yet been published. Relevant tables from it are included in the Appendix hereto. Unfortunately, printing costs prevent *Amicus* from reproducing the whole thesis as part of this brief. However, *Amicus* will provide the Court with a copy of the thesis if one is requested.

[7] All of America's accredited medical schools are members of the AAMC.

grade point averages of applicants in the 1973-74 application year, Dr. Zeim made the following findings:

Race	*% with GPA of 2.5 or Below*	*Mean GPA*
Black	58.2%	2.51
Other U.S. Minority	34.5%	2.81
Caucasian	25.1%	2.97[8]

Under its regular admissions program, the Medical School summarily rejected applicants with GPAs below 2.5. 18 Cal. 3d, at 41. Thus, the use of GPA alone as a selection criterion would eliminate over two times as many blacks as whites, and 1.4 times as many other minorities as whites. This disparity becomes even more significant when one considers that the minority applicant pool studied by Dr. Zeim did not include those persons deterred from applying to Medical School because of an assumption (correct or not) that a low GPA would disqualify them, and that a GPA of over 2.5 did not guarantee an interview, much less admission. *Id.*[9]

The disparate effect of GPA on minority applicants is underscored when applied to the facts of this case:

	Class entering 1973	*Class entering 1974*
Average GPA of regular admittees	3.51	3.36
Average GPA of special admittees	2.62	2.42

Brief for Respondent in Opposition, p. 11.

[8] See Appendix A, attached hereto.

[9] Further, numerous minorities are eliminated because they are underrepresented in the nation's undergraduate institutions. See

Respondent would have the Court conclude that because his GPA was higher than that of the special admittees he was denied equal protection of the laws. But the discrepancy between GPAs (as well as MCAT scores) is not dispositive of the issue here, for when the discrepancy is coupled with the invalidity of these criteria (see IB, *supra*), it is in fact the minority applicant who is effectively denied equal protection.[10]

2. The Medical College Admission Test

Disparate impact of the MCAT on minority applicants is even more pronounced. The Zeim study shows, for example, that on the science section of the examination minority performance in the 1973-74 year was as follows:

Race	*Scored 400 or below*	*Scored 620 or above*	*Mean Score*
Black	43%	2.5%	427.5
Other U.S. Minority	13.4%	18.0%	518.6
Caucasian	8.1%	24.4%	547.5[11]

At all levels, therefore, white scores were significantly higher than minority scores. In the case of the Medical School at Davis in the years respondent applied, the discrepancy was equally apparent:

The Social and Economic Status of Negroes in the United States, 1970 BLS Report No. 394 (published in 1971 by the Bureau of the Census), p. 81, Table 67.

[10] An explanation of the legal basis underlying this denial is found in IIA, *infra*.

[11] See Appendix B, attached hereto.

Class Entering in Fall, 1973

	MCAT[12] *Verb.*	*Quan.*	*Sci.*	*Gen. Info.*
Average of Regular Admittees	81	76	83	69
Average of Special Admittees	46	24	35	33

Class Entering in Fall, 1974

	MCAT Verb.	*Quan.*	*Sci.*	*Gen. Info.*
Average of Regular Admittees	69	67	82	72
Average of Special Admittees	34	30	37	18[13]

It is undisputed, therefore, that the use of the MCAT as an inflexible criterion for admission would have been discriminatory, and in fact, all but exclusionary. Again, in view of the lack of validity of the test as a predictor of "qualifications" for physician performance or success, as shown in IB(2), *infra*, its use to exclude minority applicants becomes suspect, and the use of the special admissions program constitutionally and statutorily required.

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[12] The MCAT consists of four sections: Verbal (Verb.), Quantitative (Quan.), Science (Sci.), and General Information (Gen. Info.).

[13] Source: *Brief for Respondent in Opposition*, p. 11. Respondent has not explained these numbers, but presumably they are the percentiles within which the candidates' scores fall. *Cf.* 18 Cal. 3d at 43.

B. *The admission criteria which impact adversely on minority applicants do not bear any proven relationship to physician or medical student performance.*

The evidence in the record[14] and data available in published and unpublished studies demonstrate that undergraduate GPA and MCAT scores are not adequate predictors of success in either medical school or physician practice. And in no event should the criteria be used as absolute screening devices, as was done before the special admissions program was implemented.[15]

1. Grade point average as a non-predictor of physician and medical student performance.

To date, the most sophisticated and extensive study of the correlation of GPA to physician performance has been done by Philip B. Price, *et al.* and is entitled *Measurement and Predictors of Physician Performance* (LLR Press, South Salt Lake City, Utah 1971) ("Price Study").

That part of the Price Study pertinent here was conducted in 1964. The methodology used involved isolating more than "200 variables which might be viewed as iden-

[14] Understandably, petitioner did not present an overwhelming amount of evidence below regarding the validity of the traditional entry criteria. It would seem that for whatever reason, and *Amicus* submits such reason would be expediency, the Medical School still wishes to use these criteria to screen white applicants. The validity of continued use of these criteria for that purpose need not be considered here, however, since as has been shown above, the criteria do not discriminate against whites. The validity of the criteria are called to question, nonetheless, because they do discriminate against minorities.

[15] The traditional criteria may be of limited use in the selection process in that they can weed out totally unsuitable candidates. *Amicus* does not object to their use for this purpose, provided it is not discriminatory. The criteria become objectionable, however, when they are used in the higher ranges in a futile attempt to determine that one applicant is better than another.

tifiable measures of physician performance." *Price Study* at p. 11. These variables were then applied to about 800 physicians divided into four groups: full time medical faculty members, specialists in private practice, urban general practitioners, and small town rural general practitioners. *Id.* at p. 10. For each group, 80 pertinent criterion measures selected from the 200 variables were applied by computer to each physician within the group.[16] Correlations were then sought between physician performance and, *inter alia*, undergraduate grades. Significantly, none were found:

> Most importantly, this study clearly demonstated that performance in formal education, as measured by grade point averages, emerged as a factor almost completely independent of all the other factors having to do with performance as a physician. That was true of all four groups of physicians investigated. . . . *Id.* at p. 13.[17]

[16] Examples of the variables used are: Rating of "clinical excellence" by medical college department head; total number of listings in honorary compendiums; number of times during career invited to serve on scientific and professsional advisory boards; number of patients seen per day; average number of house calls made per week; opinion of expert panel of overall performance based on all available information; number of years between receiving MD and receiving National Board certification. *Price Study*, at pp. 34-36.

[17] The report continued:

> Specifically, when the intercorrelations were viewed across the three measures of academic performance, and the measures of on-the-job performance in practice, the authors found that 97 percent of those intercorrelations were of zero-order magnitude. Conversely, only three percent were of sufficient magnitude to indicate any significant, non-zero relationship between undergraduate grades and physician performance, and more of those were negative than positive. In view of the large number of intercorrelations involved (849), one might have expected at least three percent of them to show significant relationships merely by chance. *Price Study* at p. 13.

A similar, more elaborate study conducted the next year produced the same result: academic achievement showed little correlation to qualification for physician practice. *Id.*[18]

Still another researcher has found:

> At this time [1965] medical school grades seem to bear a positive relationship to the early success of physicians. These grades are apparently not predictive of physician performance after the first few years of practice. *The evidence suggests that undergraduate grades are unrelated to success in medical practice.*
>
> Hoyt, *The Relationship between College Grades and Adult Achievement* (Iowa City, Iowa's American College Testing Program, 1965), p. 30 (emphasis added).

Not surprisingly, the Medical School reached a conclusion in accord with the researchers' view of the value of GPA as a predictor, at least for minority students. The head of the Admissions Committee stated, "quantitative data . . . such as the grades of applicants, do not necessarily reflect the capabilities of disadvantaged students." *Declaration of George H. Lowrey, M.D.*, p. 8 (Clerk's Transcript, p. 68).

The findings of the studies cited certainly call into question respondent's claim that he is more qualified to study medicine than those persons admitted to the Medical School

[18] This study is referred to by Price as "Jacobsen, *et al.*" *Price Study* at p. 13. *Amicus* has been unable to locate the text of this study. Price does note, however, that:

> The results indicated that grades (and more specifically, the premedical grades, preclinical grades in medical school, and clinical grades for the final two years of medical school) all had little relationship to the quality of performance in practice as measured by our [Price's] criteria. This held true for all four groups of physicians studied. *Id.*

with lower GPAs than he. Additionally, the studies reveal that respondent's request to be admitted over the special admissions acceptees would have an unlawful result since he seeks admission based upon criteria that give whites a significant advantage over minorities, but do not correlate positively to the ability to study or practice medicine. (See IIA, *infra.*)

2. The MCAT as a non-predictor of physician and medical student performance.

The evidence is equally compelling that MCAT scores bear little relation to perfomance in medical school, and absolutely no relation to later performance in medical practice. This is especially true for minority applicants.

The follow-up study (Jacobsen, *et al.*) to the Price Study, *supra,* found no significant correlations between MCAT scores and physician performance:

> In the same study [Jacobsen, *et al.*] Medical College Admission Test scores were obtained for a subsample of the total physician pool. Only zero level correlations were found between those scores and the physician performance criteria, whether the MCAT scores were taken as an average for each student or were broken down into their four components (*i.e.* separate scores on verbal, quantitative, social or scientific categories). *Price Study,* p. 17.

Nor do high MCAT scores predict ability to successfully complete medical school. A study performed on Medical School attrition[19] evaluated the Medical School perform-

[19] Johnson, D.G. and Hutchins, E.B., "Doctor or Dropout? A Study of Medical School Attrition," 41 J. Med. Educ., No. 12, p. 1107 (December, 1966).

ance of students based upon their science achievement MCAT scores (1949-1958 entrants). As the relevant table from that study shows,[20] 87% of the applicants scoring between 400 and 449 received M.D. Degrees, as compared to 93% for the 500 and 549 range. Thus the apparent wide disparity between the mean scores of minorities (427.5 and 518.6)[21] and that of whites (547.5)[22] results in only a six percentage point difference in total medical school performance.[23] *Amicus* submits that this difference becomes insignificant when weighed against the importance of equal educational opportunity.

In any event, the use of the MCAT as an absolute screening device for minorities is invalid. As one study has found:

[20] See Appendix C, attached hereto.

[21] For blacks and other U.S. minorities respectively in 1973, according to the Zeim Study.

[22] For whites in 1973, according to the Zeim Study.

[23] Although some problem may exist in comparing the 1973 mean scores with the result of the study based upon data collected for the years 1949-1958, this problem is minimized by two factors. First, the objective meaning of the numerical score achieved on the MCAT has remained constant since 1951:

> *Since 1951 a scaled score of 500 is automatically the equivalent of the score of 500 in 1951.* As a result, each particular score indicates a standard level, ability or achievement independent of the year in which it was earned. . . . This equating procedure simply makes it possible to compare individuals or groups who have taken different test forms at different times. Sedlacek, W.E., Ed., ***Medical College Admission Test Handbook for Admissions Committees,*** Second Edition (American Association of Medical Colleges, Evanston, Ill., 1967), p. 11 (emphasis original).

Second, even if mean scores on the MCAT have risen over the years, a substantial rise would be needed to effect any significant difference in the extent to which the score is a predictor of medical school achievement. As the Johnson study, ***supra,*** indicates, even a difference of 100 points on the exam only translates into a six percent difference in ability to obtain the M.D. degree.

> The opinion of many professional educators is that, at best, the MCAT is of limited usefulness in the admission process. Serious questions have been raised about the validity of tests such as MCAT for assessing the potential of minorities from markedly different cultural patterns and backgrounds where such factors as sparse exposure to vocabulary-building and poorer early academic environments are common. There is widespread feeling that verbal and general information subtests of the MCAT are biased against minority and nonurban applicants.
>
> Colorado Advisary Committee to the United States Commission on Civil Rights, *Access to the Medical Profession in Colorado by Minorities and Women* (Denver, June, 1976), p. 27 (footnotes omitted).[24]

[24] This report may be found in the Eric Microfiche System. available at most education or teaching school libraries. The Eric number of the report is 130-806.

The invalidity of test scores for screening purposes is recognized by manufacturers of examinations similar to the MCAT who caution against using tests alone to disqualify applicants. particularly minority applicants. For example, the Educational Testing Service warns in the guide to the use of its Graduate Record Examination ("GRE"),

> Test scores of educationally disadvantaged students should be considered diagnostic as well as selective and should never be used in isolation. The uncritical use of test scores to forecast individual students' performance is inappropriate, especially so with respect to students handicapped in their earlier educational preparation. For the most valid estimate of 'these students' potential, consideration should be given to multiple criteria, some of which may go beyond traditional academic measures. In addition to GRE scores and undergraduate record, evidence of motivation, drive, and commitment to education should be assessed, as well as indications of leadership qualities and interest and achievement in the chosen field of study. Educational Testing Service, GRE, *Guide to the Use of the Graduate Record Examination*, 1974-75 (Princeton: *Educational Testing Service*, 1974), p. 16.

The inability of MCAT and similar examinations to predict future educational and professional performance, especially for minority persons, renders respondent's position untenable. He asks to be considered "more qualified" than other (minority) applicants on the basis of criteria that discriminate against them, and do not relate to their ability to study or practice medicine. Acceptance of respondent's argument mandates a denial of equal protection for minority students.

C. *The Medical School had prior knowledge of the disparate impact of the selection criteria and their invalidity.*

The record is clear that the special admissions program was instituted because the Medical School knew of the discriminatory effect of its traditional selection criteria. Moreover, the School seriously questioned the validity of these criteria in predicting physician performance, at least for minority applicants.

As to the effect of the traditional criteria on minorities, petitioner has stated:

> The medical school of the University of California at Davis opened in 1968. In short order the faculty realized . . . that traditional admissions criteria plainly failed to allow access for any significant number of minority students (CT 15, 57-58, 67, 85-86 [page numbers are petitioner's reference to Clerk's Transcript below]). *Petition for Certiorari*, p. 5.

Equally clear is the fact that the Medical School seriously questions the ability of its traditional criteria to measure the abilities of minority applicants. The chairman of the admissions committee stated:

> Another reason special consideration may need to be given to minorities is that quantifiable data, such as the test scores and grades of applicants do not necessarily reflect the capabilities of disadvantaged persons. They may reflect inadequate prior schooling which the applicant is only gradually overcoming. *Declaration of George H. Lowrey, M.D.*, pp. 8-9 (Clerk's Transcript pp. 68-69).

Thus, when it established the special admissions program, the Medical School acted upon a basis of experience which forced the conclusion that absent the program, there would be unlawful discrimination against minority applicants.[23]

D. *The record below.*

The studies referred to herein are not part of the record. However, this Court has broad discretion to take judicial notice of facts and any studies as may support them. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11 (1954). Nonetheless, it may well be that whether or not a decision is rendered on the merits of this case, a remand will be in order.

There are significant deficiencies in the record compiled below which were brought to the attention of this Court by various *amici* in a brief submitted in opposition to the petition for *certiorari*.[24] We agree, considering the importance of the issue now before this Court, that the case

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[23] The unlawfulness of the admissions procedure, absent the special program, is the subject of IIA, *infra*.

[24] See *Brief of the National Urban League, et al. as amici curiae*, pp. 19-27.

merited considerable exposition. However, it is urged that on the facts in the record and those of which judicial notice may be taken, this Court can conclude that the special admissions program undertaken by the Medical School was permissible and in fact required, or that it would be in the proper circumstances. We do not express opposition to a remand to establish a more complete record for deciding whether the special admissions program is permissible or to establish the existence of circumstances under which this Court may deem such a program permissible.[27]

II. Legal Analysis.

A. *Abandonment of the special admissions program as ordered by the court below will result in unlawful discrimination.*

Without the special admissions program the Medical School will return to admitting few, if any, minority students, and will do so solely on the basis of criteria that both disparately impact on minority applicants and bear no proven relationship to physician or student performance.[28] To sanction a return to this system will be to effect violations of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

1. The equal protection clause.

Utilization of a selection system that almost totally excludes minority applicants and, at the same time, serves no valid purpose, with knowledge of the legal insufficiencies, violates the equal protection clause of the Fourteenth Amendment. Cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

[27] For example, a remand may be necessary in order to further establish the invalidity of the selection criteria, as discussed above.

[28] No reasonable alternative exists. See IIB(3), *infra*.

The selection criteria utilized by the Medical School disproportionately exclude minority applicants (IA, *supra*). Moreover, those selection criteria bear little if any relation to physician or medical student performance (IB, *supra*). Finally, the Medical School was well aware of the deficiencies in the selection criteria (IC, *supra*).

In *Washington* v. *Davis, supra,* this Court reversed a finding of discrimination violative of equal protection. The finding was based solely upon the disproportionate impact of employment selection criteria, *i.e.,* a written examination. Disproportionate impact was not, *a fortiori,* a constitutional violation; this Court held that a denial of equal protection required a discriminatory purpose.

Here, the intent found to be lacking in *Washington* would exist if the Medical School were to utilize a selection system that did not include the special admissions program. In *Washington,* the Court noted that disproportionate impact could lead to further inquiry as to discriminatory purpose. 426 U.S. at 242, 246. Addressing this inquiry, the Court found that "the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition . . . , and the relationship of the test to the training program . . ." precluded a finding of intentional discrimination. *Id.* at 246. Each of these exculpatory elements is lacking in the present case. The Medical School engages in no affirmative efforts, other than the special admissions program; its return to reliance on the traditional criteria alone would eliminate

those affirmative efforts and would create a virtually all-white student body. Finally, the traditional criteria have not been correlated positively with medical school or physician performance. Thus, based on the analysis adopted in *Washington,* the inference that the Medical School engaged in intentional discrimination, as evidenced by its disproportionate selection of non-minority applicants—those who scored highest on the traditional criteria—could not be rebutted.[29]

Unlike the employer in *Washington,* the Medical School itself questions the validity of its traditional selection criteria for all applicants. By instituting the special admissions program, the School has shown its recognition of the potential illegality of the absolute use of GPAs and MCAT scores. Any use or return to use of the old selection system would necessarily involve intentional discrimination, and meets the stricter rule of *Washington, supra.* Cf. *Village of Arlington Heights* v. *Metropolitan Housing Development,* —— U.S. ——, 97 S. Ct. 555, 563 (1977); *Castaneda* v. *Partida,* —— U.S. ——, 97 S. Ct. 1272, 1279 (1977). To hold otherwise would anomalously allow universities to knowingly use questionable selection criteria that discriminate, so long as discriminatory animus is not exhibited.

[29] Unlike *Washington,* this is not a situation in which the Medical School is "seeking modestly to upgrade" its student body. The Medical School admits that traditional criteria do not measure the abilities of non-minorities accurately (see p. 17, *supra*), and that all minorities admitted under the special program are qualified to study medicine. *Petition for a Writ of Certiorari,* p. 8.

2. Title VI of the Civil Rights Act of 1964.

Independent of any constitutional restraint, the Medical School was and still is under a statutory obligation to utilize the special admissions program. Indeed, if the decision below is left standing, the admissions procedure will be in direct contravention of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[30]

Title VI, the cases decided thereunder and the applicable regulations make it clear that: (1) the Medical School could not and cannot legally use the GPA and MCAT as admission criteria without a concomitant special admissions program and (2) the Medical School in fact was required to take affirmative action by way of a special admissions program to adjust for discrimination engendered by prior use of discriminatory criteria.

The applicable federal regulations as promulgated by the Department of Health, Education and Welfare pursuant to Title VI provide that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin."[31] Construing this regulation and others under Title VI, this

[30] Section 601 of Title VI prohibits discrimination based upon "race, color or national origin . . . under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

Although the record does not expressly indicate that the Medical School receives federal funds, respondent originally predicated part of his case on Title VI, and petitioner cross-claimed for a declaration that its procedure comported with that statute. Of course this Court can take judicial notice of the fact that state universities receive substantial federal funds. Alternatively, counsel may be asked to clarify the matter at oral argument, or if necessary, the issue could be clarified upon remand.

[31] 45 C.F.R. §80.3(b)(2).

Court has held that, "Discrimination is barred which has that *effect* even though no purposeful design is present. . . ." *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974) (emphasis original). Cf. *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

In *Lau*, failure to provide English language instruction to non-English speaking children was held to violate the Act. The policy, presumably neutral on its face, heavily burdened Chinese students in the San Francisco schools and effectively excluded them from participating in and receiving the benefits of the federally funded educational program. Similarly, the criteria that respondent seeks to have applied "equally" to all applicants to the Medical School are facially neutral. However, practice and experience have demonstrated that these criteria have the unlawful effect of discriminating against minority applicants. Recognizing this, the School was required to make necessary adjustments in evaluating applicants so that discrimination imposed by use of these criteria was avoided.

Additionally Title VI required the Medical School to act affirmatively to remedy the discriminatory effects of the selection criteria previously used at Davis and other medical schools in the California Regents system.[32] To the extent that the special admissions program sought to take such affirmative action,[33] it was in compliance with 45 C.F.R.

[32] Of course, the Medical School at Davis is not the only such school in the California University system. However new the Davis campus may be, discriminatory selection criteria were certanly used by other medical schools in California for a number of years prior to the institution of any special admissions programs. This is a fact which, although not in the record, could be easily established upon remand.

[33] Insofar as the special admissions program was established to adjust for disparities in GPAs and MCAT scores among minority applicants, it was not taking "affirmative action" at all, but rather

§80(b)(6), which requires affirmative action in the administration of programs by recipients that have previously discriminated and permits affirmative action "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin."[34]

eliminating discriminatory selection criteria. To the extent that the program set and met yearly goals for minority admittees, it may not have been taking such action, since the goals, 15-16%, were not even representative of the minority population in the area, which was 25%. See 18 Cal.3d at 88, n. 16. By this observation *Amicus* does not suggest that higher goals would have been inappropriate.

[34] HEW's "Illustrative Applications," 45 C.F.R. §80.5(i) and (j), are helpful here:

> (i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under §80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of §80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example of special arrangement for obtaining referrals *or making selections which will insure that groups previously subjected to discrimination are adequately served.* (Emphasis added.)
>
> (j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

The states have broad latitude in implementing programs necessary to comply with federal statutory law. In *United Jewish Organizations* v. *Carey*, ——U.S. ——, 97 S.Ct. 996 (1977),[35] New York's use of racial criteria in reapportioning voting districts under the Voting Rights Act of 1965 was challenged by whites as being violative of the Fourteenth and Fifteenth Amendments. This Court held that the state could use racial criteria in order to comply with the applicable federal statute and the Court's interpretation of it. —— U.S. at ——, 97 S.Ct. at 1009; *cf. Beer* v. *United States*, 425 U.S. 130 (1976).

A similar result should be reached here. Creation and administration of the special admissions program by the Medical School is comparable to the action of the State of New York in *United Jewish Organizations, supra*: it established a race conscious remedy for a recognized violation of a federal statute. *Cf. Lau* v. *Nichols, supra.*

B. *The special admissions program did not create racial categories; it made rational adjustments in selection procedures to equalize admission opportunities as among the "qualified" applicants.*

Respondent's main contention that he is "more qualified" to study medicine than those admitted through the special admissions program (see *Brief for Respondent in Opposition to the Petition for Writ of Certiorari*, pp. 20-22) is unsupported by the facts.

Initially, it bears noting that petitioner considers all accepted applicants to be qualified. See *Petition for Writ of Certiorari*, p. 8. Respondent was one of a pool of white

[35] This case is discussed in more detail at pp. 26-28, *infra*.

and minority applicants, all of whom the Medical School deemed qualified to study medicine. *Id.*, p. 3. Limited space dictated selection of less than all for admission, and the law required that selection be made without invidious discrimination. The use of the special admissions program did not create such invidious discrimination, because under it, race was not the determinative factor in deciding whether to admit an applicant. All applicants were considered on the basis of their GPAs, MCATs and personal interviews. Then, in recognition of the fact that the GPAs and MCATs were not adequate measures of the abilities of minority students, the race of the applicant was an additional factor that was considered. The inclusion of race as a consideration was an attempt to correct an acknowledged error resulting from the use of traditional criteria, which failed to measure adequately the abilities of minority applicants. Selection by means of the special admissions program, a "race conscious" remedy, thus did not result in a racial classification within the meaning of the equal protection clause. *Cf. Morton* v. *Mancari*, 417 U.S. 535, 553-54 (1974).

The more simplistic view of this case taken by respondent ignores the realities of our society and renders equal protection as conceived in the Constitution meaningless:

> It is by now well understood . . . that our society cannot be completely color-blind in the short term if we are to have a color-blind society in the long term .... Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities. *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

Although respondent is in the unenviable position of being denied a place at the Medical School, he has not been discriminated against. He holds no different position than numerous other rejected but "qualified" applicants, both white and minority. The device used here to alleviate discrimination against minorities is simply not within the interdiction of the equal protection clause. (See also IIC (1), *infra* and the cases cited therein.) Since there has been no racial classification within the purview of the Constitution, respondent's equal protection claim must fail.

C. *Assuming arguendo the creation of racial classifications, the special admissions program was a constitutionally valid exercise of the state's power to remedy and avoid unlawful discrimination.*

1. Racial classifications can be used to remedy past and present unlawful discrimination.

The use of racial classifications to remedy discrimination is a proper exercise of the state's discretion. In *United Jewish Organizations* v. *Carey, supra,* this Court considered the constitutionality of using race in a purposeful manner to draw voting district lines, and concluded:

> There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment. —— U.S. at ——, 97 S. Ct. at 1009-10.

In the instant case there is similarly no evidence that the special admissions program was adopted to impose a racial slur or stigma on whites, or on respondent individually. The program in fact was adopted precisely to avoid such a result as to minorities.

United Jewish Organizations necessarily dealt with the effect that the race conscious plan had on the rights of the majority. The Court held that in the face of discrimination at the polls, the state could use race as a criterion in order to equalize the distribution of political power, so long as there was no invidious purpose to fence out or minimize any racial or political group, and no effect of doing so. —— U.S. at ——, 97 S. Ct. at 1010-11. The Court went on to note,

> [the reapportionment] plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County . *Id.* at ——, 97 S. Ct. at 1011.

In the instant case, the special admissions program neither intended nor effected the fencing out of whites from participation in the Medical School. Indeed, white partcipation in the School (84-86%) was maintained well above relevant white representation in the Davis area (75%).[34] As in *United Jewish Organizations,* the special program sought to establish a "fair allocation" of places in the face of discriminatory selection criteria which would preclude such an allocation.

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[34] See footnote 33, *supra.*

Nor was respondent as an individual white constitutionally aggrieved by the program. Whenever there are more qualified applicants than there are places, some individual, minority or white, will suffer a denial. The equal protection clause does not guarantee respondent a place in medical school.[37] It only guarantees that he and others will not be denied a place on account of race. In each year that respondent applied, he had a large number of places open to him, indeed, a larger number proportionate to his race than minority candidates found available to them. Respondent can no more say that he was unlawfully denied entry because of his race than the white voters in *United Jewish Organizations* could say that they were unlawfully denied voting rights or representation because of theirs.[38]

In *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976), the Court upheld an award of retroactive seniority to victims of discrimination prohibited by Title

[37] Nor has a right to attend Medical School been alleged under the due process clause, and properly so. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Of course, in *United Jewish Organizations, supra*, this Court was required to consider the possibility of infringement upon the constitutionally protected right to vote. —— U.S. at ——, 97 S. Ct. at 1010. Because no corresponding right inures to respondent here, his claim, if any, can only flow from the equal protection clause.

[38] It is not disputed that there is a certain value in a medical education, both in terms of monetary reward and prestige. However, the rights to vote and be represented are of even more importance. These are fundamental rights which have been jealously protected by this Court. See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964).

VII of the Civil Rights Act of 1964.[39] This remedy was held to be proper under Title VII even though it would necessarily work to the detriment of incumbent white employees. As the Court noted, 424 U.S. at 777-78 (footnote omitted):

> We are of the view . . . that the result which we reach today—which, standing alone, establishes that a sharing of the burden of past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "[a]tainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 188.

In *Franks* no conflict was seen between the remedy granted and the equal protection clause. Although some hardship necessarily fell upon white non-discriminatees in *Franks*, the greater statutory goal of equality in employment justified the remedy.[40] Cf. *Morton* v. *Mancari*, *supra*.

[39] 42 U.S.C. §2000e *et seq.* Title VII is a sister statute to Title VI, with which the Medical School was required to comply. There is good reason to construe Title VI and Title VII similarly, and this court has seen fit to do so. For example, the standard of proof under both statutes is virtually the same. Compare *Lau* v. *Nichols*, *supra* with *Griggs* v. *Duke Power Company*, *supra*.

[40] *Franks* was recently reaffirmed in *International Brotherhood of Teamsters* v. *United States*, —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977). There the Court again held retroactive seniority to be a proper remedy for victims of discrimination in violation of Title VII. —— U.S. at ——, 45 U.S.L.W. at 4512. In so doing, this Court cautioned that a trial court should " 'recreate the conditions and relationships that would have been had there

Califano v. *Webster*, —— U.S. ——, 97 S. Ct. 1192 (1977), equally apposite, dealt with a provision of the Social Security Act[41] which effectively resulted in a higher level of monthly old-age benefits for retired female wage earners. *Id.* at ——, 97 S. Ct. at 1194. In upholding the provision as one which served important governmental objectives and was substantially related to their achievement, this Court noted,

> The challenged statute operated directly to compensate women for past economic discrimination. . . . "[W]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." . . . . Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination. . . . *Id.* at ——, 97 S. Ct. at 1195 (citations omitted).

Previous and concurrent lower court caselaw accords with the Court's approval of race (and sex) conscious remedies in *United Jewish Organizations, Franks* and *Califano* v. *Webster*. See, *e.g.*, *United States* v. *City of Chicago*,

been no' unlawful discrimination." *Id.* at ——, 45 U.S.L.W. at 4518 (citation omitted). In the present case, the Medical School's special admissions program sought to accomplish precisely that result. By neutralizing the effect of the invalid traditional criteria with regard to minority applicants, the Medical School is "recreating" the conditions that would have existed had there been no discrimination.

[41] Section 215(b)(3) of the Act, 42 U.S.C. §415(b)(3).

549 F.2d 415, 436 (7th Cir. 1977); *Mims* v. *Wilson*, 514 F.2d 106, 109 (5th Cir. 1975); *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified en banc*, 473 F.2d 1029 (3rd Cir. 1973); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir.) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); Cf. *Alevy* v. *Downstate Medical Center*, 39 N.Y.2d 326 (Ct. App. N.Y. 1976); see also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The above cited cases recognized the principle that *United Jewish Organizations, Franks* and *Califano* v. *Webster* affirmed: racial (and sexual) classifications utilized, without discriminatory animus, to remedy discrimination and achieve equality are not denials of equal protection. To hold otherwise would divest the equal protection clause and the federal anti-discrimination statutes of any practical effect, and recognize a right without a remedy.

2. A judicial finding of discrimination was not a prerequisite to the adoption of the special admissions program.

In overturning the special admissions program, the court below relied in part upon its conclusion that past discrimination by the Medical School had not been shown. 18 Cal 3d at 57-58.[42]

Although race conscious remedies for discrimination have been ordered by courts upon finding discrimination, that is not required before remedial steps may be taken. *United Jewish Organizations* v. *Carey*, *supra*, addressed

[42] Unfortunately, and understandably, neither party made a showing below as to past discrimination, and the record is therefore deficient with respect to this element. See ID, *supra*. But even if this Court should deem a finding of past discrimination necessary for the institution of the special admissions program, a remand would be in order, not an affirmance of the decision below.

this precise issue. This Court upheld the power of the state to implement a race conscious plan, and rejected the argument that such a plan could not be instituted without "findings . . . of prior discrimination . . .," —— U.S. at ——, 97 S. Ct. at 1005, noting,

> The permissible use of racial criteria is not confined to eliminating the effects of *past* discriminatory districting or apportionment. ——U.S. at ——, *Id.* at 1007 (footnote omitted) (emphasis added).

This rule comports with previously established law. In *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 16, it was noted:

> School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; . . .

Accord: *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra,* 490 F.2d at 17 and the cases cited therein ("... the discretionary power of public authorities to remedy past discrimination is even broader than that of the judicial branch . . ."); *Germann* v. *Kipp,* —— F.Supp. ——, 45 U.S.L.W. 2486 (W.D. Mo., April 7 1977); *cf. EEOC* v. *American Telephone & Telegraph Company,* 419 F.Supp. 1022, 1040 (E.D. Pa. 1976), *aff'd,* —— F.2d ——, 45 U.S.L.W. 2508 (3d Cir., April 22, 1977).

Germann v. *Kipp, supra,* is particularly apposite. In that case the Kansas City Fire Department voluntary adopted an affirmative action program without a prior judicial finding of discrimination. The court upheld the program as against allegations of equal protection violations by non-minority males, noting:

> The requirement of a finding of past discrimination before a court, in the exercise of its broad equitable power, may compel implementation of an affirmative action plan, including quota relief, does not necessarily mandate the conclusion that an employer may not voluntarily implement a reasonable, short term affirmative action plan to remedy the effects of historical discrimination. ——F.Supp. at ——, 45 U.S.L.W. at 2486.

The ruling in *Germann* v. *Kipp* supports public agencies in their efforts at voluntary compliance with the law, and in doing so, encourages equality, not unnecessary litigation. Moreover, the decision is consonant with the many cases judicially approving consent agreements requiring employers to use racial hiring ratios to eliminate the effects of discrimination. See, *e.g., EEOC* v. *American Telephone & Telegraph Company, supra; Woods* v. *City of Saginaw,* 75 10083JH (E.D. Mich. 1977); *United States* v. *City of St. Louis,* 410 F.Supp. 948, 960 (consent decree entered into pending final disposition of action based on race discrimination in employment), *modified* 418 F.Supp. 383 (E.D. Mo. 1976) (consent decree adopted as final judgment); *Penn* v. *Stumpf,* C-6JCL (N.D. Cal., Dec. 20, 1973); *Emeryville Citizens for Better Government* v. *Neary,* C-71-940 CBR (N.D. Cal., Oct. 26, 1973); *NAACP* v. *Im-*

perial County Irrigation District No. 60-302-GT (S.D. Cal., 1972); *Martinez* v. *Grand Rapids Civil Service Board*, No. G-178-72, 6 Cir. Hs. Rev. 685 (W.D. Mich., Jan. 22, 1973); *United States* v. *Operating Engineers, Local 3*, C-71-1277 RFP (N.D. Cal., 1973).

3. There are no alternative methods preferable to the special admissions program.

The Court below held that the Medical School failed to establish that the goals of the special admissions program could not have been "substantially achieved by means less detrimental to the majority." 18 Cal. 3d at 53. This approach was erroneous for two reasons.

First, whatever means is utilized, if the goal of equality in Medical School admissions is achieved, the effect on the majority will be exactly the same—a certain number of places traditionally taken by whites will instead go to minority applicants. We have previously argued that the goal, avoidance of unlawful discrimination, is legitimate and within the power of the state to pursue. (See IIC(1), *supra*.) By focusing his attack on the means utilized to reach the goal, respondent would have the end required by the Constitution and statute frustrated to his benefit. He asks this Court to award to him one of the positions at the Medical School, and in fact to sanction the use of discriminatory criteria but for which minorities would be admitted in more representative numbers.

Equally erroneous was the California Supreme Court's suggestion of alternative procedures to the special admissions program. 18 Cal. 3d at 54-56. In effect the Court below has suggested that the Medical School substitute

more subjective criteria for all applicants. 18 Cal. 3d at 54-55. But this "solution" might well engender more problems than it solves, for subjective criteria are particularly susceptible to abuse, especially from an equal protection standpoint. Cf. *Castaneda* v. *Partida, supra*, —— U.S. at ——, 97 S. Ct. at 1280; *United States* v. *City of Chicago, supra*, 549 F.2d at 432; see also *Washington* v. *Davis, supra*, —— U.S. at ——, 96 S. Ct. at 2048. The better solution is to allow the Medical School to use the special admissions program until valid non-discriminatory criteria are developed.[43]

In remedying race discrimination, the states and the courts are faced with the challenge of formulating fair procedures, a challenge which often must be met with seemingly unorthodox methods. Here, the prior system used by the Medical School unlawfully discriminated against minority applicants. Standing alone, the special admissions program might seem to effect a similar result as to whites. But together, the two programs represent an acceptable way to fairly allocate an increasingly scarce resource. Whatever system may be devised in the future, the present one should not be abandoned, since it is lawful, effective, and fair to both minorities and non-minorities.

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[43] As the Price Study on *Measurement and Predictors of Physicians Performance, supra*, concluded:

> Clearly our overall investigation remains unfinished. Some questions have been answered, but many new ones have emerged. We found that it was comparatively easy to show that traditional grades and other objective selection criterion tests bear little relation to future performance in medicine. But it is a much harder task to find valid predictors to replace grades. *Price Study*, p. 159.

D. *The compelling state interest standard is inapplicable here, but even if it is, such an interest is present.*

Ample authority of this Court supports the premise that the "compelling state interest" standard is inapplicable here. In *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 29 (1973), those "suspect" classifications meriting this strict standard for analysis were delineated:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

See also *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Graham* v. *Richardson,* 403 U.S. 365 (1971). Thus, standards against which alleged equal protection violations are measured must take cognizance of the relationship between the interest which the state seeks to accommodate and the relative significance of the right claimed to have been invaded. In this case, the state's interest in designing and implementing programs which eliminate racial exclusion from educational facilities is of a compelling-enough nature to justifiy circumscribing any right respondent may have to admission in Medical School. In this case, race is not irrelevant to a constitutionally acceptable state purpose, *i.e.*, elimination of a segregated medical student body.[*]

[*] A related and equally compelling argument holds that it cannot be unconstitutional for the majority to discriminate against itself. See Ely, "The Constitutionality of Reverse Discrimination," 41 U. Chi. L. Rev. 723 (1974). This argument posits that the protection of the Fourteenth Amendment is directed toward "discrete and insular minorities," and when such protection is afforded, even if at the expense of members of the majority, it is constitutionally permissible. Although in agreement with this argument, *Amicus* will not treat the point in this brief, since it is well covered in the Ely article, *supra*.

If this Court should determine that the racial factor implicit in this case gives rise to a "suspect" racial classification, that program must then be measured against the compelling state interest standard. *Graham* v. *Richardson, supra.* The record reflects the Medical School administrators' recognition of a severe national shortage of minority physicians and the need to effectuate racial diversity in the medical student body and the medical profession. *Declaration of George Lowrey M.D.*, pp. 5, 7, and 8, Clerk's Transcript pp. 65, 67 and 68. These purposes are, of course, the inverse of those existing in cases of invidious racial classifications, requiring strict scrutiny.

The compelling interest behind official efforts to remove indicia of racial bias and caste in this country has long been acknowledged by this Court. A considerable number of years ago, the Court recognized that equal education requires an interaction among professional school students which contributes to the learning process and fits all students for a more meaningful contribution to their profession. *Sweatt* v. *Painter, supra;* see also *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). In *Harper* v. *Virginia State Board of Elections,* 338 U.S. 663, 669 (1966), the Court stated:

> . . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of

> equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. (Emphasis original.)

Given the importance of removing barriers to the participation of minorities in the medical profession and of training a professional population that more accurately reflects the racial composition of this nation, it is submitted that the test for constitutionality of the Medical School's procedure has been met by petitioner. To cast upon academia the needless and impossible task of affording equal opportunity for medical education to minority students by devising a method which does not utilize race, is, in fact, to relegate the teachings of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), to the realm of fantasy.

The interested and ambitious black student of today finds himself in an anomalous position. *Brown* v. *Board of Education* theoretically enunciated his right to equal educational opportunity and rendered unlawful segregated institutions. Twenty-three years later, after the accumulation of a plethora of legal authorities, affirming and reaffirming the thesis of *Brown*, the post-*Brown* generation finds itself not far advanced from the position occupied by its parents. Legislation guaranteeing equal employment opportunities together with the right to an equal and unsegregated education have encouraged the aspirations of these students. These judicial and legislative promises need translation into reality to be more than patriotic American folklore. Judicially enunciated rights are, too often, rendered unattainable by judicial interpretation. Evolution to a society unburdened by racial bias need not be impeded by rigid constitutional construction.

The constitutional importance of unsegregated education and of increasing opportunity for disadvantaged minorities to advanced education and the consequent fulfillment of their potential outweighs whatever implicit and benign racial classification exists in the admissions program for the Medical School.

Conclusion

For the foregoing reasons, as well as those stated by petitioner and other *amici* in support of petitioner, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Undergraduate grade average by race, for 1973-74 U.S. medical school applicants.

college grades	race							
	Afro-American		other U.S. minority		non U.S. minority		Caucasion	
	number	%	number	%	number	%	number	%
2.50	1142	58.2	582	34.5	379	29.8	8677	25.1
2.50-2.59	139	7.1	48	2.8	55	4.3	1038	3.0
2.60-2.69	103	5.2	54	3.2	56	4.4	1121	3.2
2.70-2.79	90	4.6	74	4.4	66	5.2	1484	4.3
2.80-2.89	78	4.0	75	4.4	54	4.2	1701	4.9
2.90-2.99	84	4.3	96	5.7	65	5.1	2083	6.0
3.00-3.09	76	3.9	114	6.7	109	8.6	2455	7.1
3.10-3.19	58	3.0	101	6.0	82	6.5	2265	6.6
3.20-3.29	42	2.1	106	6.3	86	6.8	2600	7.5
3.30-3.39	44	2.2	80	4.7	56	4.4	2182	6.3
3.40-3.49	31	1.6	85	5.0	84	6.6	2289	6.6
3.50-3.59	25	1.3	86	5.1	52	4.1	1933	5.6
3.60-3.69	14	0.7	51	3.0	47	3.7	1445	4.2
3.70-3.79	14	0.7	69	4.1	28	2.2	1365	4.0
3.80 +	22	1.1	68	4.0	52	4.1	1895	5.5
total	1962	100.0	1689	100.0	1271	100.0	34,533	100.0
mean grades	2.51		2.86		2.81		2.97	

Source: Zeim, "Social and Educational Determinants of the Race, Sex and Social Class Origins of U.S. Physicians" (Unpublished Thesis and Study) (Harvard School of Public Health, 1977), p.89, Table 38.

APPENDIX B

Science MCAT scores by race, for 1973-74 U.S. medical school applicants.[a]

science MCAT	race: Afro-American number	%	other U.S. minority number	%	non U.S. minority number	%	Caucasion number	%
400	881	43.9	230	13.4	154	11.8	2884	8.1
400-419	147	7.3	65	3.8	42	3.2	661	1.9
420-439	185	9.2	99	5.8	62	4.7	1009	2.8
440-459	143	7.1	97	5.6	63	4.8	1411	4.0
460-479	118	5.9	77	4.5	74	5.7	1469	4.1
480-499	108	5.4	140	8.1	88	6.7	2014	5.7
500-519	88	4.4	128	7.4	85	6.5	2569	7.2
520-539	114	5.7	122	7.1	95	7.3	2831	8.0
540-559	51	2.5	106	6.2	89	6.8	2592	7.3
560-579	52	2.6	120	7.0	109	8.3	3106	8.8
580-599	37	1.8	110	6.4	91	7.0	3321	9.4
600-619	34	1.7	117	6.8	92	7.0	2939	8.3
620 +	50	2.5	310	18.0	263	20.0	8664	24.4
total	2008	100.0	1721	100.0	1307	100.0	35,470	100.0
mean MCAT	427.5		518.6		527.6		547.5	

a. 1973-74 AAMC applicant file.

Source: Zeim. "Social and Educational Determinants of the Race, Sex and Social Class Origins of U.S. Physicians" (Unpublished Thesis and Study) (Harvard School of Public Health, 1977), p.88, Table 37.

APPENDIX C

Expectancy Table for Medical School Progress Based on Science Achievement MCAT Scores of 1949-1958 Entrants

If Science Score Is Between:	Based on N of:	Chances in 100 That Student Will Make Progress Indicated: Total M.D.	On Time M.D.	Delayed M.D.	Repeat M.D.	Academic Dropout	Non-academic Dropout	Total Dropout
750-799	396	96	91	3	1	1	4	4
700-749	1,731	96	90	3	3	1	3	4
650-699	4,539	95	90	3	2	2	3	5
600-649	8,859	95	90	2	3	2	3	5
550-599	12,586	94	90	1	3	3	3	6
500-549	15,135	93	88	1	4	4	3	7
450-499	13,202	90	84	1	5	6	4	10
400-449	9,057	87	80	1	6	9	4	13
350-399	3,973	82	73	1	8	12	6	18
300-349	1,158	75	63	1	11	19	6	25
250-299	167	63	52	2	9	26	11	37
200-249	31	68	68	0	0	19	13	32
No MCAT	4,619	88	82	1	5	6	6	12
Total	75,453	91	85	1	4	5	4	9

Source: Johnson, D.G. and Hutchins, E.B., "Doctor or Dropout? A Study of Medical School Attrition," 41 J. Med. Educ., No. 12, p. 1107, 1260 (Appendix C.6.10) (December, 1966).